SC No. 93379-1

NO. 47238-4-II

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LIA TRICOMO,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

PETITION FOR REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER 1
B. OPINION BELOW 1
C. ISSUES PRESENTED 1
D. STATEMENT OF THE CASE 2
1. The opinion of the Court of Appeals is contrary to this Court's Double Jeopardy case law 6
2. The opinion of the Court of Appeals with respect to the Ms. Tricomo's involuntary guilty plea is contrary to other opinions of the Court of Appeals and presents a significant constitutional issue 9
3. Contrary to this Court's opinions the trial court erred in refusing to consider relevant evidence at sentencing 17
F. CONCLUSION 20

TABLE OF AUTHORITIES

Washington Supreme Court

In re the Personal Restraint of Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004) 10
State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998) 7
State v. Barton, 93 Wn.2d 301, 609 P.2d 1353 (1980) 11
State v. Bobic, 140 Wn.2d 250, 996 P.2d 610 (2000) 7
State v. Chadderton, 119 Wn.2d 390, 832 P.2d 481 (1992) 19
State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995) 6
State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183, 1185 (2005) 17
State v. Knight, 162 Wn.2d 806, 174 P.3d 1167 (2008) 7
State v. Leyda, 157 Wn.2d 335, 138 P.3d 610 (2006) 7
State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006) 11
State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996) 10
State v. Turley, 149 Wn.2d 395, 69 P.3d 338 (2003) 10
State v. Tvedt, 153 Wn.2d 705, 107 P.3d 728 (2005) 7
State v. Villanueva-Gonzalez, 180 Wn.2d 975, 329 P.3d 78 (2014) .. 7, 8
State v. Westling, 145 Wn.2d 607, 40 P.3d 669 (2002) 7
State v. Williams, 181 Wn.2d 795, 336 P.3d 1152 (2014) 19
State v. Womac, 160 Wn.2d 650, 160 P.3d 40 (2007) 8
Wood v. Morris, 87 Wn.2d 501, 554 P.2d 1032 (1976) 10

Washington Court of Appeals

State v. Kennar, 135 Wn. App. 68, 76, 143 P.3d 326 (2006) ... 14, 15, 16
State v. Knotek, 136 Wn. App. 412, 149 P.3d 676 (2006), *review denied*, 161 W.2d 1013 (2007) 13, 14, 15

United States Supreme Court

Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) 12, 13, 14, 15
Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed.2d 274 (1969) 9, 10
Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) 10
North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) 6

Statutes

RCW 9.94A.530 18
RCW 9.94A.535 ..... 12, 13

RCW 9.94A.537 12
RCW 9A.20.021 11

Court Rules

CrR 4.2 ..... 15, 16
RAP 13.4 1

A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Petitioner Lia Tricomo asks this court to accept review of the opinion of the Court of Appeals in *State v. Tricomo*, 47238-4-II (April 26, 2016); Order Denying Motion to Reconsider (June 1, 2016).

B. OPINION BELOW

The Court of Appeals concluded Ms. Tricomo's convictions of murder and assault did not violate the double jeopardy prohibitions of the state and federal constitutions. Moreover the court concluded Ms. Tricomo's guilty plea was voluntary even where she was misadvised of the maximum sentence she faced.

C. ISSUES PRESENTED

1. The double jeopardy provisions of the State and federal constitutions bar multiple convictions for the same offense. Where the unit of prosecution of a crime consists of course of conduct a person may not be separately convicted for acts within that course of conduct. Because assault is a course of conduct offense do Ms. Tricomo's multiple assault convictions violate double jeopardy?

2. If the defendant is misadvised about the direct sentencing consequences, including the applicable maximum sentence for the offense

and term of community custody, the resulting plea is not entered knowingly, voluntarily and intelligently. Where Ms. Tricomo was misadvised about the maximum sentence that could be imposed was her guilty plea invalid?

3. At sentencing court's task is to impose a sentence which is proportionate to a person's culpability. The court should consider evidence which bears upon or mitigates the person's culpability. Did the sentencing court err where it artificially and substantially limited its consideration of such evidence?

D. STATEMENT OF THE CASE.

Coming from a childhood marked by poverty, abuse and array of familial dysfunction, such as being introduced to the regular use of alcohol by her father beginning at age 12. CP 53-54. Ms. Tricomo sought refuge in music, becoming an accomplished violinist. CP 54. As early as middle-school, she began performing in community orchestras comprised mainly of adult musicians. CP 54-55

Beginning in adolescence and continuing into adulthood, Ms. Tricomo began to suffer from mental illness. CP 63-64. Ms. Tricomo's diagnoses include on Axis I: Major Depressive Disorder, Bipolar Disorder, Posttraumatic Stress Disorder and Alcohol Dependence, and on Axis I

Borderline Personality Disorder and Antisocial Personality Disorder. CP 76-77. Her history is marked by numerous suicide attempts and commitments to Western State Hospital and other regional mental health facilities on several occasions. CP 56, 63-64.

For a period of time and despite these hurdles, she succeeded in obtaining a bachelor's degree in music, and continued to play with larger and more prestigious regional orchestras. CP 66

In 2010, Ms. Tricomo began receiving treatment at Behavioral Health Resources (BHR) in Olympia. CP 56. In 2011, she began working with therapist John Alkins. *Id.*

BHR records indicate Mr. Alkins sessions with Ms. Tricomo were twice or more in duration than with other counselors. CP 56. During their sessions, Mr. Alkins often talked about music rather than her mental health or other topics common to therapy. *Id.* On occasion he would visit Ms. Tricomo at home to record music. *Id.*

Mr. Alkins was subsequently placed on leave and then fired by BHR, apparently for an inappropriate relationship with another client. Even after this, Mr. Alkins continued communicating with Ms. Tricomo. CP 56.

In April 2013, Ms. Tricomo was faced with losing her residence. CP 56. During that same period she was using Paxil as prescribed for her depressive disorder. *Id.*

Mr. Alkins offered to Ms. Tricomo a room in his home, which she accepted. After picking up her things from her apartment, Mr. Alkins stopped to buy Ms. Tricomo a bottle of vodka on the drive home. This despite the fact that as her therapist for a period of months he must have known of her history of alcohol dependence.

At his home, and after Ms. Tricomo had consumed a large portion of the vodka, Mr. Alkins initiated sex. CP 5. Ms. Tricomo later described the sexual activity as unwanted, although she did not tell him that. *Id.* After the two went to Mr. Alkins's bedroom, Ms. Tricomo briefly tied Mr. Alkins's hands to his bed, untying them when he stated he did not like that. *Id.* When she did so, Ms. Tricomo slit his neck several times with a knife she had brought into the bedroom. *Id.* She stated she did so with the intent to kill him. *Id.*

Mr. Atkins walked about the house for a period of time trying to stop the bleeding, but refused to call for help due to concerns about the consequences of having a sex with a former client. *Id.* Near the front door, the two struggled over the knife and Ms. Tricomo cut his wrists several

times. *Id.* Mr. Alkins returned upstairs where he lay on the floor bleeding. Ms. Tricomo strangled him with an electrical cord. *Id.*

The following morning Ms. Tricomo called a crisis line and reported she had stabbed a man. CP 6. Ms. Tricomo then used Mr. Alkins's car to drive to an Alcoholics Anonymous meeting where she asked for help. *Id.* Another meeting participant drove her to the mental health unit at St. Peters Hospital in Olympia. *Id.*

The State charged Ms. Tricomo with one count of first degree murder and one count of attempted first degree murder. CP 7. The State subsequently amended the information to charge one count of second degree murder, three counts of second degree assault, and one count of taking a motor vehicle. CP 25-26. Ms. Tricomo pleaded guilty as charged. CP 27-35.

Prior to sentencing, Ms. Tricomo submitted a mitigation report prepared by Dhyana Fernandez as well as psychological evaluation prepared by Dr. David Dixon. CP 42-120. Ms. Fernandez detailed Ms. Tricomo's family history of deprivation and abuse, her struggles with mental illness and alcohol, and highlighted her successes despite that history. Ms. Fernandez also provided information regarding reported violent side effects for the use of Paxil. CP 52-57. Dr. Dixon described

Ms. Tricomo's history of "aberrant" violent behavior when she perceives violations by others. Dr. Dixon explained these are redirected at the childhood violations she suffered at the hands of others including her father. CP 77. Dr. Dixon explained her withdrawal from Paxil "exacerbated her mood disorder into a manic state with psychosis." CP 98. Ms. Tricomo requested a sentence of 257 months.

The trial court substantially limited its consideration of this material and imposed a sentence of 357. CP 217.

E. ARGUMENT.

1. The opinion of the Court of Appeals is contrary to this Court's Double Jeopardy case law.

The double jeopardy provisions of the state and federal constitutions protect against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Focusing on the third of these, the prohibition on multiple punishments, this Court has said

> When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime.

State v. Bobic, 140 Wn.2d 250, 261, 996 P.2d 610 (2000) (citing *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). A person may not be convicted more than once under the same criminal statute if only one "unit" of the crime has been committed. *State v. Leyda*, 157 Wn.2d 335, 342, 138 P.3d 610 (2006); *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005) (citing *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002)).

> The United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges. *Brown v. Ohio,* 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). . . .

Adel, 136 Wn.2d at 635. The unit of prosecution, the punishable conduct under the statute, may be an act or a course of conduct. *Tvedt*, 153 Wn.2d at 710. This Court has determined assault is a course of conduct crime. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 984, 329 P.3d 78 (2014).

"Where a double jeopardy violation is clear from the record, a conviction violates double jeopardy even where the conviction is entered pursuant to a guilty plea. *State v. Knight*, 162 Wn.2d 806, 812, 174 P.3d 1167 (2008). In her guilty plea Ms. Tricomo agreed to permit the trial

court to review the affidavit of probable cause to determine the factual basis for her plea. That affidavit describes the incident and permits this Court to conclude the multiple convictions violate Double Jeopardy.

It is clear from the facts, Ms. Tricomo's acts constituted a single criminal episode driven by the singular intent to kill Mr. Alkins. She first attempted to kill him by repeatedly slitting his neck. She prevented him from leaving and in the process repeatedly cut him again. Ultimately she strangled him with and electrical cord. While some time did pass, the acts were a part of an unbroken chain of events driven by that singular intent. Because her acts were a single course of conduct Ms. Tricomo could only be convicted of a single count of assault. *Villanueva-Gonzalez*, 180 Wn.2d at 984. Even if the brief separation in time suggested two separate assaultive acts, that could not support three assault convictions. As such, Ms. Tricomo's multiple assault convictions violate double jeopardy prohibitions.

Further, the assaults and the murder constitute the same offense for double jeoapardy puposes. Where they are based on same conduct murder and assault are the same offense for double jeopardy purposes. *See State v. Womac*, 160 Wn.2d 650, 654-55, 160 P.3d 40 (2007) (entry of convictions for homicide by abuse, second degree felony murder, and first degree

assault for death of his son violated double jeopardy principles). Again the facts establish a single intent to kill Mr. Alkins. While an autopsy determined strangulation caused his death, it specifially found the bleeding caused by the knife wounds to be a contributing factor in that death and concluded the bleeding would have ultimately proved fatal. CP 124. The assault and murder counts therefore arose from a single course of conduct and constitute the same offense.

The opinion of the Court of Appeals takes a myopic view of the facts and fails to address the crimes as the continung course of conduct they are. In doing so, the opinion is contrary to this Court's decisions and presents a significant constitutional issue. This Court shold accpet review.

2. The opinion of the Court of Appeals with respect to the Ms. Tricomo's involuntary guilty plea is contrary to other opinions of the Court of Appeals and presents a significant constitutional issue.

The Fourteenth Amendment's Due Process Clause requires that a defendant's guilty plea be knowing, voluntary, and intelligent. *Boykin v. Alabama,* 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed.2d 274 (1969); *In re Bradley*, 165 Wn.2d 934, 939, 205 P.3d 123 (2009). When a person pleads guilty:

> He . . . stands witness against himself and he is shielded by the Fifth Amendment from being compelled to do so – hence the minimum requirement that his plea be the

> voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial – a waiver of his constitutional right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.

Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

Because of the constitutional rights waived by a guilty plea, the State bears the burden of ensuring the record of a guilty plea demonstrates the plea was knowingly and voluntarily entered. *Boykin*, 395 U.S. at 242. "The record of a plea hearing or clear and convincing extrinsic evidence must affirmatively disclose a guilty plea was made intelligently and voluntarily, with an understanding of the full consequences of such a plea." *Wood v. Morris*, 87 Wn.2d 501, 502-03, 554 P.2d 1032 (1976).

A guilty plea is involuntary if the defendant is not properly advised of a direct consequence of his plea. *State v. Turley*, 149 Wn.2d 395, 398-99, 69 P.3d 338 (2003); *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); *see also*, *In re the Personal Restraint of Isadore,* 151 Wn.2d 294, 298, 88 P.3d 390 (2004) ("A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences.") "A direct consequence is one that has a 'definite, immediate and largely automatic

effect on the range of the defendant's punishment.'" *Bradley*, 165 Wn.2d at 939 (quoting *Ross,* 129 Wash.2d at 284).

The length of a sentence is a direct consequence of a guilty plea. *State v. Mendoza,* 157 Wn.2d 582, 590, 141 P.3d 49 (2006); Thus, a plea is involuntary if a defendant is misinformed of the length of sentence even if the resulting sentence is less onerous than represented in the plea. *Id.* at 591. A "defendant must be advised of the maximum sentence which could be imposed prior to entry of the guilty plea." *State v. Barton,* 93 Wn.2d 301, 305, 609 P.2d 1353 (1980).

Mr. Tricomo's guilty plea states:

(a) Each crime with which I am charged carries a maximum sentence, a fine, and a ***Standard Sentence Range*** as follows:

COUNT NO.	OFFENDER SCORE	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements*	COMMUNITY CUSTODY	MAXIMUM TERM AND FINE
1	8	257-357 months	N/A	36 months	$50,000, Life
2	8	53-70 months	N/A	12 months	$20,000, 10 yrs
3	8	53-70 months		12 months	$20,000, 10 yrs
4	8	53-70 months	N/A	12 months	$20,000, 10 yrs
5	5	4-12 months		N/A	$10,000, 5 yrs

CP 28.

RCW 9A.20.021(a) provides the maximum terms for various degrees of felony convictions. Class A felonies such as second degree

murder may be punished with up to life imprisonment. Class B felony offenses, such as second degree assault, may be punished up to ten years in prison. Class C felony offenses have five year maximum terms. However, as the Supreme Court ruled in *Blakely v. Washington*, 542 U.S. 296, 301-02, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), while a certain term imprisonment may be permitted under RCW 9A.20.021, it is not the statutory maximum sentence for the charged offense. Instead, the Court noted the maximum sentence was "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."* (Emphasis in the original.) *Id.*

The maximum sentence is the maximum permissible sentence the court could impose as a consequence of the guilty plea. *Id*. Here, the standard range is the maximum possible sentence the court could impose for the offenses of which Ms. Tricomo was convicted. The court has authority to impose a sentence above the standard range only under the strict parameters of RCW 9.94A.535 and RCW 9.94A.537, in addition to the requirements of the state and federal constitutional guarantees of trial by jury and due process of law.

Under RCW 9.94A.537(1), the State is required to give notice it will seek a possible exceptional sentence *before* the entry of a guilty plea.

When not sought by the prosecution, the court is only permitted to impose an exceptional sentence if the increased sentence is based on the enumerated factors in RCW 9.94A.535(2). These factors essentially require egregious criminal history that enables an offender commit "free crimes" that go unpunished and renders the standard range to be unduly trivial. RCW 9.94A.535(2). Mr. Tricomo's standard range fully accounted for her criminal history of this nature and an exceptional sentence based on unscored criminal convictions would be unreasonable and unauthorized.

There were no circumstances in Ms. Tricomo's case which would have permitted the imposition of any sentence above the standard range. Thus, the "maximum term" was not "life," "10 yrs" or "5 yrs" as the plea stated. Instead, the maximum was the top-end of the respective standard ranges. Ms. Tricomo was misadvised of the maximum punishment she faced as a consequence of her guilty plea. *State v. Knotek*, 136 Wn. App. 412, 149 P.3d 676 (2006), *review denied*, 161 W.2d 1013(2007).

Knotek is directly on point. There the court acknowledged that before pleading guilty, a defendant needs to understand the "direct consequences of her guilty plea, not the maximum potential sentence if she went to trial. . . ." *Id.* at 424 n.8. The *Knotek* Court further agreed that *Blakely* "reduced the maximum terms of confinement to which the court

could sentence Knotek post-*Blakely* as a result of her pre-*Blakely* plea—[to] the top end of the standard ranges . . . ." *Id.* at 425. Thus, where a defendant is told the maximum sentence is life when in fact it is the top of the standard range the defendant is misadvised of the consequences of the plea.[1]

The opinion in this case concludes *Knotek* is factually distinguishable but offers no explanation for that conclusion. Opinion at 9. But the only distinguishing fact is that the appellant in *Knotek* waived the claim when she failed to move to withdraw her plea when she was later informed of the correct maximum. Here, no such waiver occurred.

Instead of following *Knotek*, at the State's urging, the opinion addresses an argument Ms. Tricomo has never raised – the meaning of CrR 4.2. The opinion relies upon Division One's opinion in *State v. Kennar* which concluded CrR 4.2 requires a guilty plea inform a defendant of the statutory maximum to ensure the voluntariness of the plea. 135 Wn. App. 68, 76, 143 P.3d 326 (2006). That conclusion is not compelled by

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[1] *Knotek*, concluded the appellant waived the right to challenge her guilty plea because the defendant was subsequently advised that no exceptional sentence was available and at the time of sentencing she "clearly understood that *Blakely* had eliminated the possibility of exceptional life sentences and, thus, had substantially lowered the maximum sentences that the trial court could impose." *Id.* at 426. In the case at bar, no discussion of *Blakely* ever occurred.

CrR 4.2, is contrary to *Knotek*, ignores the constitutional analysis, and is simply incorrect.

CrR 4.2(d) provides:

> Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

Nothing in the rule requires the trial court inform the defendant of the statutory "maximum." Instead, the rule requires the court to inform the defendant of the "direct consequences" of his plea. "A direct consequence is one that has a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Bradley*, 165 Wn.2d at 939 (Internal quotations omitted). As *Knotek* recognized, without an aggravator the statutory maximum is not a direct consequence of the plea. 137 Wn. App. at 424 n.8. *Kennar* is simply wrong in assuming the statutory maximum is a direct consequence.

The reasoning of *Blakely* and its progeny require a jury finding as to an aggravating factor because that finding alters the maximum punishment – that is without that finding the "maximum" possible penalty is the top of the standard range. At best, the "statutory maximum" is merely theoretical and wholly inapplicable to a case such as Ms.

Tricomo's in which no aggravating factor was charged and agreed to in the plea. A sentence of life in prison for a crime without a charged aggravator is no more the maximum penalty for the offense than death. Each is legally unavailable. Thus, to tell a person the maximum punishment is life, when in fact that punishment cannot legally apply absolutely misadvises them of the direct consequences of their plea. The same is true of the ten and five year statutory maximums, neither has any application where an aggravating is not involved.

Kennar's analysis misses this point entirely, insisting instead that informing a person of this fictional "maximum" is necessary to ensure the voluntariness of the plea. But, informing a person of a wholly irrelevant statutory cap which cannot apply to them in any way ensures the guilty plea is voluntary or knowing. Indeed, the opposite is true. Informing the defendant of an inapplicable sentence and telling her that it is the maximum sentence she faces when in fact it is not actually serves to undercut the validity of the plea. It is nonsensical to insist CrR 4.2 requires a court to engage in a practice that renders the plea unconstitutional. *Kennar* is simply wrong. The statutory "maximum" is not a direct consequence of the plea and nothing in CrR 4.2 or the constitutional analysis says otherwise.

Ms. Tricomo was not properly informed of the consequences of her plea and she must be permitted to withdraw it. This Court should accept review of this claim.

3. Contrary to this Court's opinions the trial court erred in refusing to consider relevant evidence at sentencing.

A person "may always challenge the procedure by which a sentence was imposed." *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183, 1185 (2005). While no defendant has a right to any particular sentence, she does have the right to propose a sentence and have the court actually consider it. *Id.* at 342. Despite *Grayson*, the opinion of the Court of Appeals repeatedly states Ms. Tricomo has failed to cite authority that requires a sentencing court to consider the evidence presented. Opinion at 10-11. *Grayson* entitles Ms. Tricomo to have the sentencing court consider her request.

Nonetheless the trial court strictly limited its consideration of Mr. Tricomo's mitigation report. The court stated it would only consider it as background, and would not consider any discussion of the potential effects of prescribed use of Paxil in the weeks preceding the incident. 1/28/15 RP 39. Moreover, the court refused to consider any opinion as to the appropriate sentence. *Id.* at 39-40. The court based these self-imposed

limitations on its belief that since Ms. Tricomo was not requesting an exceptional sentence below the standard range the court could not consider mitigation evidence. *Id.*

Later in the hearing the court voiced a similar view concluding RCW 9.94A.530 prevented the court from considering any facts other than those contained in the statement of probable cause, as those were the facts Ms. Tricomo's acknowledged in her plea. *Id.* at 43.

In his argument in support of the defense recommendation, defense counsel highlighted forensic evaluations, by both the State and defense experts, which found Ms. Tricomo was suffering from mental impairment. *Id* at 78. Dr. Dixon went further to describe the impact of Ms. Tricomo's withdrawal from Paxil as exacerbating her disorder into a manic state with psychosis. CP 98. The defense expert concluded it amounted to diminished capacity. CP 98-99. While disagreeing as to its legal effect, the state's expert, Dr. Delton Young, agreed that at a minimum Ms. Tricomo was suffering psychotic symptoms. 1/28/15 RP at 78; CP 201. Counsel urged the court to consider two statutory mitigating factors in support of Ms. Tricomo's recommended sentence: (1) that while insufficient to constitute a complete defense her mental health significantly affected her

conduct, and (2) that her capacity to appreciate the wrongfulness of her conduct was significantly impaired. 1/28/15 RP 84.

In announcing its decision the court discounted the import of the expert opinion, commenting that Mr. Tricomo's ability to form the intent was no longer at issue as a result of her guilty plea. 1/28/15 RP 92. But that misses the point. The mitigating factors cannot be limited to circumstances where a defendant has not pleaded guilty or has not been found to have a certain intent by a jury. Instead, by their very language they apply only after conviction and despite such a guilty plea or verdict. Contrary to the court's conclusion, the mitigating factors and evidence had continued and substantial relevance in Ms. Tricomo's case.

Mitigating factors do not absolve a person of liability for the crime; rather they focus the court's analysis on the person's relative culpability for what is admittedly a criminal act. The Supreme Court explained "sentencing courts are concerned with the proportionality of a defendant's punishment in relation to his or her culpability." *State v. Williams*, 181 Wn.2d 795, 800, 336 P.3d 1152 (2014); *see also State v. Chadderton*, 119 Wn.2d 390, 398, 832 P.2d 481 (1992) ("[w]hat is important is whether the conduct was proportionately more culpable than that inherent in the crime."). Relative culpability for a given act is the essence of criminal law.

The notion that that Ms. Tricomo's guilty plea prevented consideration of this mitigating evidence would preclude courts from engaging in their obligation of ensuring sentences is proportionate to culpability.

This court should remand for a new hearing at which the sentencing court gives full consideration to the evidence before it.

F. CONCLUSION.

For the foregoing reasons, this Court should grant review in this case.

Respectfully submitted this 28th day of June, 2016.

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Filed
Washington State
Court of Appeals
Division Two

April 26, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LIA YERA TRICOMO, Appellant.	No. 47238-4-II UNPUBLISHED OPINION

LEE, J. — Lia Yera Tricomo pleaded guilty to second degree murder, three counts of second degree assault, and second degree taking a motor vehicle without owner's permission. Tricomo appeals, arguing that her convictions violate double jeopardy, her plea was not entered voluntarily, and that the trial court erred in not considering evidence at sentencing. We disagree and affirm.

FACTS

Tricomo and the victim, her former counselor, had a sexual encounter at the victim's home in the upstairs bedroom. Following the sexual encounter, Tricomo repeatedly slit the victim's throat with a razor knife. Tricomo acknowledged that she brought the knife to the upstairs bedroom in preparation to kill the victim. For several hours after having his throat slit, the victim "walked around the house," attempting to stop the bleeding. Clerk's Papers (CP) at 5. Tricomo, concerned that the victim would attempt to leave the house, struggled with the victim over the razor knife at the entryway. The victim's wrists were cut in the struggle. The victim then went

back upstairs to the bedroom, and Tricomo strangled him with an electrical extension cord, killing him.

The State charged Tricomo with second degree murder and three counts of second degree assault.[1] At the plea hearing, the trial court informed her that the applicable maximum term of confinement for the second degree murder charge was a life sentence, the "standard range of actual confinement was 257 to 357 months," and the State would recommend a sentence of 357 months. Verbatim Report of Proceedings (VRP) (Nov. 6, 2014) at 7. Tricomo acknowledged that she understood.

At sentencing, Tricomo offered an expert report that included a discussion of the effects of Tricomo's medication. The trial court ruled that it would consider the expert's report for purposes of background information, but that it would disregard the expert's discussion of medication because "I don't find that [the expert] has any expertise in that particular area and she basically only sets forth a number of articles suggesting that they may have some relevance." VRP (Jan. 28, 2015) at 39. The trial court reviewed letters from individuals in support of Tricomo, two reports from Western State Hospital, and portions of Tricomo's expert's report. The trial court noted that the "issue before me today is not whether or not Ms. Tricomo had the ability to form a specific intent to kill. That's been established by her pleading guilty to this charge." VRP (Jan. 28, 2015) at 92. Ultimately, the court sentenced Tricomo to 357 months, which was within the standard sentencing range. Tricomo appeals.

[1] The State also charged Tricomo with second degree taking a motor vehicle without the owner's permission. The morning after Tricomo strangled the victim, she left the victim's home in the victim's vehicle. The conviction for second degree taking a motor vehicle is not at issue in this appeal.

ANALYSIS

A. DOUBLE JEOPARDY

Tricomo argues that double jeopardy bars her convictions for three counts of second degree assault, and her convictions for second degree assault and second degree murder. Tricomo did not raise the double jeopardy argument below, but a constitutional challenge may be raised for the first time on appeal. *State v. Adel*, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998); *see accord State v. Reeder*, 181 Wn. App. 897, 925-26, 330 P.3d 786 (2014), *review granted in part*, 337 P.3d 325, *aff'd*, 184 Wn.2d 805, 365 P.3d 1243 (2015).

Both the federal and state double jeopardy clauses protect against multiple punishments for the same offense. U.S. CONST. amend. V; WASH. CONST. art. I, § 9; *State v. Hart*, 188 Wn. App. 453, 457, 353 P.3d 253 (2015). Generally, a guilty plea will insulate the defendant's conviction from collateral attack. *State v. Knight*, 162 Wn.2d 806, 811, 174 P.3d 1167 (2008). A guilty plea waives "'constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one's accusers.'" *Knight*, 162 Wn.2d at 811 (quoting *Florida v. Nixon*, 543 U.S. 175, 187, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004)). But claims that go to "'the very power of the State to bring the defendant into court to answer the charge brought against him,'" like the double jeopardy clause, are not waived by guilty pleas. *Knight*, 162 Wn.2d at 811 (quoting *Blackledge v. Perry*, 417 U.S. 21, 30, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974)); *see Menna v. New York*, 423 U.S. at 62, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975). After a defendant pleads guilty, "the double jeopardy violation must be clear from the record presented on appeal, or else be waived." *Knight*, 162 Wn.2d at 811.

We review alleged violations of double jeopardy de novo. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980, 329 P.3d 78 (2014). Different double jeopardy analyses apply depending on whether the convictions at issue were under the same statutory provision or different statutory provisions. *Villanueva-Gonzalez*, 180 Wn.2d at 980. Where a defendant has multiple convictions under the same statutory provision, we apply the "unit of prosecution" analysis. *Villanueva-Gonzalez*, 180 Wn.2d at 980. But when a defendant has convictions under different statutes, we apply the same evidence analysis.[2] *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995).

1. Three Counts of Second Degree Assault

Tricomo was convicted of three counts of second degree assault pursuant to RCW 9A.36.021. Because the second degree assault convictions arise from the same statutory provision, we apply the "unit of prosecution" analysis. *Villanueva-Gonzalez*, 180 Wn.2d at 980-81.

Tricomo argues that her acts constituted a single criminal episode driven by the singular intent to kill the victim. Tricomo argues that because her acts were a single criminal episode, she could only be convicted of one count of assault, or two at the most, but definitely not three.

Tricomo was charged, in relevant part, with three counts of second degree assault[3] stemming from the events of one evening. Count II charged second degree assault based on the "use of a razor knife to inflict neck wounds." CP at 25. Count III charged second degree assault

[2] The same evidence test mirrors the federal "same elements" standard adopted in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932); *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

[3] RCW 9A.36.021(1)(a), (c).

based on the "use of a razor knife to inflict facial wounds." CP at 25. And count IV charged second degree assault based on the "use of a razor knife to inflict hand wounds." CP at 25.

Tricomo pleaded guilty as charged and agreed that the trial court could rely on the State's statement of probable cause and police reports to find the facts necessary to establish a factual basis for her plea. The trial court found that a sufficient factual basis existed in the record before it to accept the plea.

a. Count III (facial wounds)

The statement of probable cause does not include any information about count III, the assault charge based on infliction of facial wounds. And, the record does not contain any police reports. It is the appellant's burden to provide a sufficient record for us to review. *See State v. Gomez*, 183 Wn.2d 29, 34, 347 P.3d 876 (2015). Because a double jeopardy violation is not clear from the record presented on review, we hold that Tricomo waived her challenge to count III, the second degree assault conviction based on the use of a razor knife to inflict facial wounds. *Knight*, 162 Wn.2d at 811.

b. Count II (neck wounds) and Count IV (hand wounds)

Tricomo argues that "it is clear from the facts" that her acts "constituted a single criminal episode driven by the singular intent to kill" the victim. Br. of Appellant at 9. Tricomo also acknowledges that the facts may support two assault counts. But the record shows that the two assaults were separate courses of conduct.

Assault is a course of conduct crime, which "'helps to avoid the risk of a defendant being 'convicted for every punch thrown in a fistfight.'" *Villanueva-Gonzalez*, 180 Wn.2d at 985 (quoting *State v Tili*, 139 Wn.2d 107, 116, 985 P.2d 365 (1999)). Thus, if multiple assaultive acts

constitute only one course of conduct, then double jeopardy protects against multiple convictions. *Villanueva-Gonzalez*, 180 Wn.2d at 985. There is no bright-line rule for when multiple assaultive acts constitute one course of conduct. *Villanueva-Gonzalez*, 180 Wn.2d at 980-81. In determining whether multiple assault acts constitute one course of conduct, we consider the length of time over which the acts occurred, the location of the acts, the defendant's intent or motivation for the assaultive acts, whether the acts were uninterrupted, and whether there was an opportunity for the defendant to reconsider her acts. *Villanueva-Gonzalez*, 180 Wn.2d at 980-81. No single "factor is dispositive, and the ultimate determination should depend on the totality of the circumstances, not a mechanical balancing of the various factors." *Villanueva-Gonzalez*, 180 Wn.2d at 985.

Here, the assaultive acts occurred over several hours and in different places in the victim's home. According to Tricomo, there were hours in between the act of slitting the victim's throat and cutting the victim's wrists. Further, Tricomo's account of the events indicate that her motivation for the two attacks was different. Tricomo stated that she brought the knife with her into the upstairs bedroom "as preparation to kill" the victim, but that she cut the victim's wrists because the victim was attempting to take the knife from her. CP at 5. And, she had considerable time to reconsider her actions. For instance, she had time to reconsider during the "hours" the victim spent walking around the house after she slit his throat in the upstairs bedroom and before she cut his wrists during the struggle at the entryway. *See* CP at 5. Considering the totality of the circumstances, the assault that resulted in neck wounds was a separate course of conduct from the assault that resulted in wrist wounds. Therefore, Counts II and IV do not violate double jeopardy.

2. Second Degree Murder and Second Degree Assault

Tricomo was charged with second degree murder under RCW 9A.32.050(1)(a), and three counts of second degree assault under RCW 9A.36.021(1)(a) and (c). Tricomo contends that the murder and assaults "arose from a single course of conduct and constitute the same offense." Br. of Appellant at 10. Tricomo misconstrues the double jeopardy analysis for multiple convictions under separate statutes.

To determine if a defendant's convictions under different statutes violate double jeopardy, we apply the same evidence test. *Calle*, 125 Wn.2d at 777; *Villanueva-Gonzalez*, 180 Wn.2d at 980-81. The same evidence analysis asks whether the convictions were the same in law and in fact. *Calle*, 125 Wn.2d at 777; *accord Villanueva-Gonzalez*, 180 Wn.2d at 980-81. "If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses." *Calle*, 125 Wn.2d at 777 (quoting *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)).

Tricomo was charged with second degree murder under RCW 9A.32.050(1)(a), one count of second degree assault under RCW 9A.36.021(1)(a), and two counts of second degree assault under RCW 9A.36.021(1)(c). A person commits second degree assault under RCW 9A.36.021 when:

> (1) . . . he or she, under circumstances not amounting to assault in the first degree:
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
> . . . .
> (c) Assaults another with a deadly weapon.

Because assault is not defined in the criminal code, courts have turned to the common law for its definition. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009); *State v. Kier*, 164 Wn.2d 798, 806, 194 P.3d 212 (2008). Three definitions of assault are recognized in Washington: (1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm. *Elmi*, 166 Wn.2d at 215.

A person commits second degree murder under RCW 9A.32.050(1)(a) when:

> With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person.

Tricomo's convictions for second degree murder and second degree assault are legally different. Proof of second degree assault does not necessarily prove second degree murder because a person can assault another person without actually causing death. Second degree murder, on the other hand, requires proof of intent to cause death, and actual death. Therefore, the convictions are not the same in law.

Also, Tricomo's convictions for second degree assault and second degree murder are factually different. As discussed above, Tricomo's assault convictions arise from her acts of assaulting the victim with a razor knife. But Tricomo's second degree murder conviction arises from her strangling the victim with an electrical extension cord.

Thus, Tricomo's murder and assault convictions are not the same in law and in fact. While it is true that the convictions are based on Tricomo's actions from a particular day, they are based on different laws and actions. Tricomo's double jeopardy challenge fails.

B. CONSEQUENCES OF GUILTY PLEA

Tricomo argues that she should be able to withdraw her guilty plea because she was misinformed about the maximum sentence in her guilty plea. We disagree.

Due process requires that a defendant's guilty plea be made knowingly, voluntarily, and intelligently. *State v. Kennar*, 135 Wn. App. 68, 72, 143 P.3d 326 (2006). CrR 4.2 precludes a trial court from accepting a guilty plea without first determining that the defendant is entering the plea voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea. *Kennar*, 135 Wn. App. at 72.

Here, Tricomo pleaded guilty to second degree murder. At the plea hearing, the trial court informed her that the applicable maximum term of confinement was a life sentence and the "standard range of actual confinement was 257 to 357 months," with the State recommending a sentence of 357 months. VRP (Nov. 6, 2014) at 7. Tricomo acknowledged that she understood. The court then sentenced Tricomo within the standard range.

Tricomo contends that her plea was not made knowingly, voluntarily, and intelligently because the trial court misinformed her of the applicable maximum sentence for the offense with which she was charged. Tricomo asserts that the applicable maximum sentence was the top end of the standard range, not the statutory maximum sentence declared by the legislature. Citing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), Tricomo claims that the trial court misinformed her when it told her that life imprisonment was the applicable maximum sentence for second degree murder.

Kennar rejected Tricomo's precise argument. *Kennar*, 135 Wn. App. at 72. In *Kennar*, the court held that "CrR 4.2 requires the trial court to inform a defendant of both the applicable

standard sentence range and the maximum sentence for the charged offense as determined by the legislature." *Kennar*, 135 Wn. App. at 75. The *Kennar* court, noting that *Blakely* is a sentencing case, not a plea-entry case, held:

> Because a defendant's offender score and standard sentence range are not finally determined by the court until the time of sentencing, the Sixth Amendment concerns addressed in *Blakely* do not apply until that time. Thus, when Kennar entered his guilty plea, the maximum peril he faced was, in fact, life in prison. He was correctly informed of this by the trial court. His plea was knowingly, intelligently, and voluntarily entered. There was no error.

Kennar, 135 Wn. App. at 76.

Similarly here, at the time of her plea, Tricomo was informed of the maximum sentence and the standard sentence range for the charged offense. *Kennar* controls, and Tricomo's plea was entered knowingly, intelligently, and voluntarily.

C. EVIDENCE AT SENTENCING

Tricomo argues that the trial court erred in refusing to consider relevant evidence at sentencing. We disagree.

"As a general rule, the length of a criminal sentence imposed by a superior court is not subject to appellate review," as long as the sentence is within the standard range.[4] *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Tricomo was sentenced within the standard range. However, even if we consider whether the trial court erred in not considering Tricomo's evidence, her argument fails.

[4] We may review the sentence where a defendant requests an exceptional sentence below the standard range if the court abused its discretion by either refusing to exercise its discretion or relied on an impermissible basis for refusing to impose an exceptional sentence. *State v. Khanteechit*, 101 Wn. App. 137, 138, 5 P.3d 727 (2000). Here, however, Tricomo did not request an exceptional sentence below the standard range and was sentenced within the standard range.

In Tricomo's sentencing brief, Tricomo asked the court to consider evidence regarding her background, urging the court to sentence her at the low end of the standard range. Tricomo argues that "the court refused to consider any opinion as to the appropriate sentence." Br. of Appellant at 18. Tricomo fails to provide any authority suggesting that the sentencing court is required to consider an expert's opinion about "the appropriate sentence" where the defendant does not request an exceptional sentence. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). Thus, Tricomo's argument fails.

Tricomo next argues that the trial court erred by not considering the experts' opinions about the effects of Tricomo's medications. The trial court ruled that it would disregard the expert's discussion of medication, because "I don't find that [the expert] has any expertise in that particular area and she basically only sets forth a number of articles suggesting that they may have some relevance." VRP (Jan. 28, 2015) at 39. Tricomo fails to provide any argument as to how the trial court erred. Therefore, we do not consider this argument. RAP 10.3; *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Finally, Tricomo argues that she should have been able to present more evidence about her culpability for the crimes because the sentencing court should be concerned with whether the punishment is proportional to the culpability. Culpability is determined by the charge and conviction. *See State v. Johnson*, 180 Wn.2d 295, 306, 325 P.3d 15 (2014). And the legislature, in determining the sentencing range, accounts for culpability and dangerousness. *State v. Jordan*, 180 Wn.2d 456, 460, 325 P.3d 181 (2014). Tricomo provides no authority suggesting that during

sentencing, where the defendant does not request an exceptional sentence below the standard range based on mitigating circumstances, the trial court should readdress and reestablish a defendant's culpability for an offense that the defendant has pleaded guilty to. Again, Tricomo's argument fails. *See DeHeer*, 60 Wn.2d at 126.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, J.

Bjorgen, C.J.

Filed
Washington State
Court of Appeals
Division Two

June 1, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LIA YERA TRICOMO, Appellant.	No. 47238-4-II ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDING OPINION

Appellant, Lia Year Tricomo, moved for reconsideration of this court's unpublished opinion filed on April 26, 2016. After consideration, it is hereby

ORDERED that appellant's motion for reconsideration is denied. It is further

ORDERED that the court's opinion is hereby amended as follows: On page 9, last paragraph, after the sentence ending with "maximum sentence for second degree murder," we insert the following footnote:

> Tricomo also contends that *State v. Knotek* "is directly on point," and requires this court to allow her to withdraw her guilty plea. Br. of Appellant at 16. In *Knotek*, the United States Supreme Court issued its *Blakely* opinion after the defendant pleaded guilty but before she was sentenced. *State v. Knotek*, 136 Wn. App. 412, 425, 149 P.3d 676 (2006). The defendant argued that she was misinformed because the trial court told her that she faced the possibility of an exceptional sentence, but *Blakely* eliminated the possibility in her case. *Knotek*, 136 Wn. App. at 425. The court denied Knotek's claim, holding that she was not entitled to withdraw her plea

when she entered her plea under the belief that her standard ranges are higher than they are in fact. *Knotek*, 136 Wn. App. at 426. Thus, *Knotek* is factually distinguishable.

The subsequent footnotes are renumbered accordingly.

IT IS SO ORDERED.

DATED this 1st day of June, 2016.

Lee, J.

Worswick, J.

Bjorgen, A.C.J.

Filed
Washington State
Court of Appeals
Division Two

April 26, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LIA YERA TRICOMO, Appellant.	No. 47238-4-II UNPUBLISHED OPINION

LEE, J. — Lia Yera Tricomo pleaded guilty to second degree murder, three counts of second degree assault, and second degree taking a motor vehicle without owner's permission. Tricomo appeals, arguing that her convictions violate double jeopardy, her plea was not entered voluntarily, and that the trial court erred in not considering evidence at sentencing. We disagree and affirm.

FACTS

Tricomo and the victim, her former counselor, had a sexual encounter at the victim's home in the upstairs bedroom. Following the sexual encounter, Tricomo repeatedly slit the victim's throat with a razor knife. Tricomo acknowledged that she brought the knife to the upstairs bedroom in preparation to kill the victim. For several hours after having his throat slit, the victim "walked around the house," attempting to stop the bleeding. Clerk's Papers (CP) at 5. Tricomo, concerned that the victim would attempt to leave the house, struggled with the victim over the razor knife at the entryway. The victim's wrists were cut in the struggle. The victim then went

back upstairs to the bedroom, and Tricomo strangled him with an electrical extension cord, killing him.

The State charged Tricomo with second degree murder and three counts of second degree assault.[1] At the plea hearing, the trial court informed her that the applicable maximum term of confinement for the second degree murder charge was a life sentence, the "standard range of actual confinement was 257 to 357 months," and the State would recommend a sentence of 357 months. Verbatim Report of Proceedings (VRP) (Nov. 6, 2014) at 7. Tricomo acknowledged that she understood.

At sentencing, Tricomo offered an expert report that included a discussion of the effects of Tricomo's medication. The trial court ruled that it would consider the expert's report for purposes of background information, but that it would disregard the expert's discussion of medication because "I don't find that [the expert] has any expertise in that particular area and she basically only sets forth a number of articles suggesting that they may have some relevance." VRP (Jan. 28, 2015) at 39. The trial court reviewed letters from individuals in support of Tricomo, two reports from Western State Hospital, and portions of Tricomo's expert's report. The trial court noted that the "issue before me today is not whether or not Ms. Tricomo had the ability to form a specific intent to kill. That's been established by her pleading guilty to this charge." VRP (Jan. 28, 2015) at 92. Ultimately, the court sentenced Tricomo to 357 months, which was within the standard sentencing range. Tricomo appeals.

[1] The State also charged Tricomo with second degree taking a motor vehicle without the owner's permission. The morning after Tricomo strangled the victim, she left the victim's home in the victim's vehicle. The conviction for second degree taking a motor vehicle is not at issue in this appeal.

ANALYSIS

A. DOUBLE JEOPARDY

Tricomo argues that double jeopardy bars her convictions for three counts of second degree assault, and her convictions for second degree assault and second degree murder. Tricomo did not raise the double jeopardy argument below, but a constitutional challenge may be raised for the first time on appeal. *State v. Adel*, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998); *see accord State v. Reeder*, 181 Wn. App. 897, 925-26, 330 P.3d 786 (2014), *review granted in part*, 337 P.3d 325, *aff'd*, 184 Wn.2d 805, 365 P.3d 1243 (2015).

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1. Three Counts of Second Degree Assault

Tricomo was convicted of three counts of second degree assault pursuant to RCW 9A.36.021. Because the second degree assault convictions arise from the same statutory provision, we apply the "unit of prosecution" analysis. *Villanueva-Gonzalez*, 180 Wn.2d at 980-81.

Tricomo argues that her acts constituted a single criminal episode driven by the singular intent to kill the victim. Tricomo argues that because her acts were a single criminal episode, she could only be convicted of one count of assault, or two at the most, but definitely not three.

Tricomo was charged, in relevant part, with three counts of second degree assault[3] stemming from the events of one evening. Count II charged second degree assault based on the "use of a razor knife to inflict neck wounds." CP at 25. Count III charged second degree assault

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[3] RCW 9A.36.021(1)(a), (c).

based on the "use of a razor knife to inflict facial wounds." CP at 25. And count IV charged second degree assault based on the "use of a razor knife to inflict hand wounds." CP at 25.

Tricomo pleaded guilty as charged and agreed that the trial court could rely on the State's statement of probable cause and police reports to find the facts necessary to establish a factual basis for her plea. The trial court found that a sufficient factual basis existed in the record before it to accept the plea.

a. Count III (facial wounds)

The statement of probable cause does not include any information about count III, the assault charge based on infliction of facial wounds. And, the record does not contain any police reports. It is the appellant's burden to provide a sufficient record for us to review. *See State v. Gomez*, 183 Wn.2d 29, 34, 347 P.3d 876 (2015). Because a double jeopardy violation is not clear from the record presented on review, we hold that Tricomo waived her challenge to count III, the second degree assault conviction based on the use of a razor knife to inflict facial wounds. *Knight*, 162 Wn.2d at 811.

b. Count II (neck wounds) and Count IV (hand wounds)

Tricomo argues that "it is clear from the facts" that her acts "constituted a single criminal episode driven by the singular intent to kill" the victim. Br. of Appellant at 9. Tricomo also acknowledges that the facts may support two assault counts. But the record shows that the two assaults were separate courses of conduct.

Assault is a course of conduct crime, which "'helps to avoid the risk of a defendant being 'convicted for every punch thrown in a fistfight.'" *Villanueva-Gonzalez*, 180 Wn.2d at 985 (quoting *State v Tili*, 139 Wn.2d 107, 116, 985 P.2d 365 (1999)). Thus, if multiple assaultive acts

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Here, the assaultive acts occurred over several hours and in different places in the victim's home. According to Tricomo, there were hours in between the act of slitting the victim's throat and cutting the victim's wrists. Further, Tricomo's account of the events indicate that her motivation for the two attacks was different. Tricomo stated that she brought the knife with her into the upstairs bedroom "as preparation to kill" the victim, but that she cut the victim's wrists because the victim was attempting to take the knife from her. CP at 5. And, she had considerable time to reconsider her actions. For instance, she had time to reconsider during the "hours" the victim spent walking around the house after she slit his throat in the upstairs bedroom and before she cut his wrists during the struggle at the entryway. *See* CP at 5. Considering the totality of the circumstances, the assault that resulted in neck wounds was a separate course of conduct from the assault that resulted in wrist wounds. Therefore, Counts II and IV do not violate double jeopardy.

2. Second Degree Murder and Second Degree Assault

Tricomo was charged with second degree murder under RCW 9A.32.050(1)(a), and three counts of second degree assault under RCW 9A.36.021(1)(a) and (c). Tricomo contends that the murder and assaults "arose from a single course of conduct and constitute the same offense." Br. of Appellant at 10. Tricomo misconstrues the double jeopardy analysis for multiple convictions under separate statutes.

To determine if a defendant's convictions under different statutes violate double jeopardy, we apply the same evidence test. *Calle*, 125 Wn.2d at 777; *Villanueva-Gonzalez*, 180 Wn.2d at 980-81. The same evidence analysis asks whether the convictions were the same in law and in fact. *Calle*, 125 Wn.2d at 777; *accord Villanueva-Gonzalez*, 180 Wn.2d at 980-81. "If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses." *Calle*, 125 Wn.2d at 777 (quoting *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)).

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A person commits second degree murder under RCW 9A.32.050(1)(a) when:

> With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person.

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Also, Tricomo's convictions for second degree assault and second degree murder are factually different. As discussed above, Tricomo's assault convictions arise from her acts of assaulting the victim with a razor knife. But Tricomo's second degree murder conviction arises from her strangling the victim with an electrical extension cord.

Thus, Tricomo's murder and assault convictions are not the same in law and in fact. While it is true that the convictions are based on Tricomo's actions from a particular day, they are based on different laws and actions. Tricomo's double jeopardy challenge fails.

B. CONSEQUENCES OF GUILTY PLEA

Tricomo argues that she should be able to withdraw her guilty plea because she was misinformed about the maximum sentence in her guilty plea. We disagree.

Due process requires that a defendant's guilty plea be made knowingly, voluntarily, and intelligently. *State v. Kennar*, 135 Wn. App. 68, 72, 143 P.3d 326 (2006). CrR 4.2 precludes a trial court from accepting a guilty plea without first determining that the defendant is entering the plea voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea. *Kennar*, 135 Wn. App. at 72.

Here, Tricomo pleaded guilty to second degree murder. At the plea hearing, the trial court informed her that the applicable maximum term of confinement was a life sentence and the "standard range of actual confinement was 257 to 357 months," with the State recommending a sentence of 357 months. VRP (Nov. 6, 2014) at 7. Tricomo acknowledged that she understood. The court then sentenced Tricomo within the standard range.

Tricomo contends that her plea was not made knowingly, voluntarily, and intelligently because the trial court misinformed her of the applicable maximum sentence for the offense with which she was charged. Tricomo asserts that the applicable maximum sentence was the top end of the standard range, not the statutory maximum sentence declared by the legislature. Citing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), Tricomo claims that the trial court misinformed her when it told her that life imprisonment was the applicable maximum sentence for second degree murder.

Kennar rejected Tricomo's precise argument. *Kennar*, 135 Wn. App. at 72. In *Kennar*, the court held that "CrR 4.2 requires the trial court to inform a defendant of both the applicable

standard sentence range and the maximum sentence for the charged offense as determined by the legislature." *Kennar*, 135 Wn. App. at 75. The *Kennar* court, noting that *Blakely* is a sentencing case, not a plea-entry case, held:

> Because a defendant's offender score and standard sentence range are not finally determined by the court until the time of sentencing, the Sixth Amendment concerns addressed in *Blakely* do not apply until that time. Thus, when Kennar entered his guilty plea, the maximum peril he faced was, in fact, life in prison. He was correctly informed of this by the trial court. His plea was knowingly, intelligently, and voluntarily entered. There was no error.

Kennar, 135 Wn. App. at 76.

Similarly here, at the time of her plea, Tricomo was informed of the maximum sentence and the standard sentence range for the charged offense. *Kennar* controls, and Tricomo's plea was entered knowingly, intelligently, and voluntarily.

C. EVIDENCE AT SENTENCING

Tricomo argues that the trial court erred in refusing to consider relevant evidence at sentencing. We disagree.

"As a general rule, the length of a criminal sentence imposed by a superior court is not subject to appellate review," as long as the sentence is within the standard range.[4] *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Tricomo was sentenced within the standard range. However, even if we consider whether the trial court erred in not considering Tricomo's evidence, her argument fails.

[4] We may review the sentence where a defendant requests an exceptional sentence below the standard range if the court abused its discretion by either refusing to exercise its discretion or relied on an impermissible basis for refusing to impose an exceptional sentence. *State v. Khanteechit*, 101 Wn. App. 137, 138, 5 P.3d 727 (2000). Here, however, Tricomo did not request an exceptional sentence below the standard range and was sentenced within the standard range.

In Tricomo's sentencing brief, Tricomo asked the court to consider evidence regarding her background, urging the court to sentence her at the low end of the standard range. Tricomo argues that "the court refused to consider any opinion as to the appropriate sentence." Br. of Appellant at 18. Tricomo fails to provide any authority suggesting that the sentencing court is required to consider an expert's opinion about "the appropriate sentence" where the defendant does not request an exceptional sentence. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). Thus, Tricomo's argument fails.

Tricomo next argues that the trial court erred by not considering the experts' opinions about the effects of Tricomo's medications. The trial court ruled that it would disregard the expert's discussion of medication, because "I don't find that [the expert] has any expertise in that particular area and she basically only sets forth a number of articles suggesting that they may have some relevance." VRP (Jan. 28, 2015) at 39. Tricomo fails to provide any argument as to how the trial court erred. Therefore, we do not consider this argument. RAP 10.3; *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Finally, Tricomo argues that she should have been able to present more evidence about her culpability for the crimes because the sentencing court should be concerned with whether the punishment is proportional to the culpability. Culpability is determined by the charge and conviction. *See State v. Johnson*, 180 Wn.2d 295, 306, 325 P.3d 15 (2014). And the legislature, in determining the sentencing range, accounts for culpability and dangerousness. *State v. Jordan*, 180 Wn.2d 456, 460, 325 P.3d 181 (2014). Tricomo provides no authority suggesting that during

sentencing, where the defendant does not request an exceptional sentence below the standard range based on mitigating circumstances, the trial court should readdress and reestablish a defendant's culpability for an offense that the defendant has pleaded guilty to. Again, Tricomo's argument fails. *See DeHeer*, 60 Wn.2d at 126.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, J.

Bjorgen, C.J.

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 47238-4-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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☐ Attorney for other party

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Washington Appellate Project

Date: June 28, 2016

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